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778-177—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 173

DONALD J. PINCIOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 174

RICHARD T. GOSSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 339 F. 2d 102.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1964. Petitions for rehearing were denied on March 24, 1965. By orders of Mr. Justice Stewart, the time for filing petitions for writs of cer-

tiorari was extended to and including May 22 and May 23, 1965, in Nos. 173 and 174, respectively. The petition for a writ of certiorari in No. 173 was filed on May 21, 1965. The petition for a writ of certiorari in No. 174 was filed on May 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury that there was no evidence to sustain a defense of entrapment.

2. Whether the trial court should have ordered the acquittal of petitioner Pinciotti.

3. Whether the cross-examination of a witness who testified to the good reputation of petitioner Gosser was proper.

4. Whether the court of appeals failed to follow proper procedure under 18 U.S.C. 3500 in reviewing the trial court's ruling on a request for the production of government "witness sheets."

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners and codefendant Maison were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Petitioners were each sentenced to imprisonment for a period of three years (1 R. 1–7).[1] The court of appeals affirmed.

The indictment charged that the defendants conspired with Patricia Niedomski, a secretary in the

[1] "1 R." refers to petitioners' appendix in the court of appeals. "2 R." refers to the government's appendix in that court.

Treasury Intelligence office at Toledo, Ohio, to obtain through Mrs. Niedomski copies of documents from the confidential files of the said office relating to the income-tax investigation of petitioner Gosser (1 R. 3–7). Mrs. Niedomski, who was not indicted, testified that on October 5, 1962, she met Maison, who was married to her cousin, at the Elm Recreation Center in Toledo. Maison paid her fifty dollars for information which she furnished him on another matter and inquired whether she would like to make some money on the Richard T. Gosser case. He told Mrs. Niedomski that Gosser was especially interested in learning who the informant was in his case. He also told her that Pinciotti was Gosser's right-hand man. The court instructed the jury to limit its consideration of this evidence to defendant Maison (1 R. 34–35; 2 R. 2–4).

Mrs. Niedomski testified to a number of subsequent meetings with Maison. On October 12, she gave him some papers, the exact nature of which she did not recall, and Maison asked her to obtain a copy of the final report in the Gosser case (2 R. 5–6). On October 19, she delivered more papers which she had copied, and Maison paid her fifty dollars (1 R. 35–36; 2 R. 6–7). On October 26, she delivered copies of reports in the Gosser case and again received fifty dollars. Maison told her that he would meet Pinciotti at a place called the "Pancake House", where Pinciotti would read over the material and, after making notes, tear it up (2 R. 7–8). On October 29, there was a further conversation, at which time Maison gave Mrs. Niedomski additional names to check and

told her that they were very well pleased with the information received (2 R. 8–9).

Meanwhile, intelligence agents had observed Mrs. Niedomski's activities in copying papers in the Gosser case and her meeting with Maison on October 26, when papers were apparently passed to him (2 R. 17–18, 20–21). On November 2, they confronted Mrs. Niedomski with the evidence which they had. She took the agents to her home and gave them copies of documents from the Gosser files which she had prepared for delivery, including four sensitive case reports (2 R. 9, 23–25, 42; 1 R. 55–56). These were marked for identification and fresh copies of the documents were made (1 R. 120).

Following her usual custom, Mrs. Niedomski met Maison at the Recreation Center on Friday evening, November 9. Prior to the meeting, the agents had placed fluorescent material on the copies she was to deliver and on the inside of the envelope. Mrs. Niedomski was searched, followed to the Recreation Center and observed as she met Maison (1 R. 56–57, 76–77, 102–103; 2 R. 30–31). When Mrs. Niedomski delivered the copies, she told Maison that she had to know what was going to be done with them. Maison said that he would meet Pinciotti for a cup of coffee at the Pancake House on the following Monday, after which the information would be given to Gosser (1 R. 60–61; 2 R. 11–13). He gave Mrs. Niedomski fifty dollars, which she later turned over to the Treasury agents (2 R. 14–15).

On Monday morning, a Treasury agent and the secretary who had made the copies delivered to Maison

waited at the Pancake House. From a nearby table, they observed the meeting of Maison and Pinciotti. Maison handed Pinciotti an envelope with papers which Pinciotti examined for some time. The secretary identified the papers as those which she had prepared (1 R. 91–93; 2 R. 35–36, 47–48). That afternoon, agents went to the Retirement Center of the union of which Gosser was an officer in order to arrest Pinciotti, who was Gosser's assistant. After waiting a short time in the reception room, they followed the receptionist into an office and arrested petitioners. Gosser was seated at the desk. Pinciotti and one Neufio Scott were seated opposite him (2 R. 37–40, 50). The agents told Gosser that arrest and search warrants were being prepared but had not yet arrived. They asked permission to search, which Gosser denied, saying that the office was his (2 R. 51–52, 84). After the warrants arrived, a search was made and the documents previously turned over to Mrs. Niedomski were found in the middle drawer of the desk at which Gosser was sitting. Gosser then said that he might have seen the documents earlier—"that he sees many documents and papers during the course of the day" (2 R. 54–55). Traces of fluorescence were found on Pinciotti's right hand (2 R. 46, 61), but no fluorescent material was found on Gosser's hands or clothing (1 R. 124).

Both petitioners testified in their own behalf. Pinciotti stated that he was administrative assistant to Gosser, who was the vice president of the International Union, United Auto Workers (1 R. 133); that on the morning of Monday, November 12, he met

Maison for a cup of coffee at the Pancake House, and after casual conversation, Maison gave him two envelopes; that the only one which Pinciotti opened contained a coin collection monthly report and a football schedule (1 R. 138–142); that he took the papers to his office at the Retirement Center and placed them on top of his desk (1 R. 135, 145); that he did not know that there were any reports relating to Gosser and did not know that there was anything in the desk for which the agents were looking (1 R. 158, 160); and that the office in which petitioners were sitting when arrested was his office (1 R. 164). Pinciotti testified that he was "somewhat aware" of the income-tax investigation of Gosser, but did not know much about it. He admitted going to Washington for the purpose of talking to the President about the investigation, and being referred to Commissioner of Internal Revenue Mortimer Caplin, to whom he spoke about the Gosser investigation (2 R. 64–66). Petitioner Gosser denied any knowledge of the papers seized on November 12 or of any request, direct or indirect, for information from government files (1 R. 185–186).

ARGUMENT

1. The trial court correctly ruled that the evidence raised no jury issue of entrapment. There was no testimony whatever that petitioners were beguiled or enticed into unlawful conduct by the activity of government agents. The only testimony regarding the origin of the unlawful plan was that of Mrs. Niedomski, who said that Maison had asked her to obtain

information. Petitioners did not challenge her uncontradicted account in this regard (2 R. 87), but they now urge that if the court had not withdrawn the entrapment question from the jury, it might have rejected parts of Mrs. Niedomski's testimony (Gosser Pet. 19–20). Since petitioners dealt with Mrs. Niedomski only through Maison, however, they could not have been entrapped unless (1) Maison was entrapped or (2) Maison was acting as a government agent in entrapping them. No evidence in the record would have supported either of these inferences. And if, in fact, the jury had believed that Gosser "did not have any knowledge of or any connection with the conspiracy until the events of November 12, 1962, just before the arrests were made" (Gosser Pet. 19), it would have acquitted Gosser not on entrapment grounds but simply because he would not have been guilty of the offense charged. Since Pinciotti likewise professed ignorance of the contents of the envelope delivered to him by Maison, entrapment was not his defense. If he had been believed, the jury would have acquitted him under the instructions given by the court.

Petitioners' additional contention that an entrapment claim always presents an issue for the jury is unsound. Language to this effect has appeared in some opinions in response to the minority views expressed in *Sorrells* v. *United States*, 287 U.S. 435, *Sherman* v. *United States*, 356 U.S. 369, and *Masciale* v. *United States*, 356 U.S. 386, that the entire question of entrapment be left for determination by

the court. These statements mean only that when the issues of fact are disputed and there is evidence to support a defense of entrapment, the conflict must be resolved by the jury and not by the judge. They do not, however, require the entrapment defense to be submitted to the jury when there is nothing to support it other than the assertions of counsel. This was recognized in *Lopez* v. *United States*, 373 U.S. 427, 436, and in decisions of courts of appeals. See, *e.g.*, *Maestas* v. *United States*, 341 F. 2d 493 (C.A. 10); *United States* v. *Comi*, 336 F. 2d 856 (C.A. 4); *Harris* v. *United States*, 331 F. 2d 95 (C.A. D.C.); *Marko* v. *United States*, 314 F. 2d 595, 598 (C.A. 5); *Hester* v. *United States*, 303 F. 2d 47, 48 (C.A. 10), certiorari denied, 371 U.S. 847; *United States* v. *Kabot*, 295 F. 2d 848, 854–855 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Markham*, 191 F. 2d 936, 937–938 (C.A. 7); *Shaw* v. *United States*, 151 F. 2d 967, 969 (C.A. 6)

2. The sufficiency of the evidence, challenged by Pinciotti, presents no question warranting review. There was ample independent evidence of this petitioner's participation in the plan justifying the admission of Maison's out-of-court statements against him. This evidence consisted of testimony regarding the delivery of papers from Maison to Pinciotti; Pinciotti's admission that he transported the papers to the office in which he was arrested—which Gosser occupied and claimed as his own; and testimony regarding Pinciotti's activity on the Washington visit. *Glasser* v. *United States*, 315 U.S. 60, 74.

Nor is there any merit to Pinciotti's claim that the

conspiracy contemplated no fraud upon the United States (Pinciotti Pet. 15–19). The disclosure of sensitive reports regarding an offense to the person under investigation would manifestly interfere with and tend to defeat the purpose of the investigation. Section 371 is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the United States government. *Haas* v. *Henkel,* 216 U.S. 462, 479.

3. Petitioner Gosser challenges the propriety of the government's cross-examination of Monsignor Michael Doyle, a defense character witness who testified that he had known Gosser for about eighteen years and that his reputation in the community was "very good" (1 R. 170–171). The witness was asked a number of questions on cross-examination, including inquiries relating to Gosser's close association with Neufio Scott, a convicted felon and gambler; Gosser's plea of guilty to highway robbery in Michigan in 1921; his arrest in Toledo in 1920 on a charge of suspicion of auto theft; his arrest in Toledo in 1921 on a charge of being a fugitive from justice; his indictment in 1921 for receiving and concealing stolen property; his arrest in 1939 as a disorderly person; his questioning before the McClellan committee as to union fund activities; his connection with numbers gambling in the Willys plant in Toledo; his financial transactions in connection with properties in Michigan later sold to the union; and his association with gambling figures in Toledo (1 R. 179–183). Three times during the questioning and again in the concluding charge, the

court instructed the jury as to the limited purpose for which this testimony might be considered (1 R. 177–178, 180, 183, 202). The witness testified that he had not heard of all these matters, but that he once heard a person connect Gosser with the numbers racket, that Gosser himself on numerous occasions had said that he had served time in reform school, and that he had heard one or two persons say that they had heard something about a numbers racket going on in Toledo (1 R. 178–183).

As was pointed out in *Michelson* v. *United States*, 335 U.S. 469, if an accused puts his reputation in issue he opens his witnesses for cross-examination based upon the kind of information involved here. So long as the jury is instructed as to the limited purpose of such evidence (as it was here) and the inquiry has a basis in fact (as it did here), the cross-examination is permissible. Moreover, petitioner was warned by the court before his reputation witness testified that he was "toying with a dangerous weapon" (1 R. 177), so that he knew the risk he was assuming by putting the witness on the stand.

Petitioner urges, however, that this case is distinguishable from *Michelson* because of the large number of collateral matters inquired into during this examination. But the basis for the witness' conclusion regarding Gosser's reputation was a proper subject of inquiry, for the larger the number of incidents in petitioner's past (of which the witness has not heard) which might have affected his standing in the

community, the lesser the weight to be given such testimony.

4. At the conclusion of Mrs. Niedomski's testimony, the government turned over to the defense two affidavits of the witness and transcriptions of seven interviews with her (1 R. 44–46), but declined to turn over "witness sheets" prepared by counsel for the government. The record shows that, out of the presence of the jury, counsel stated that the sheets were his notes of the testimony which he expected the witness to give (1 R. 38, 40–41), and that he dictated them (1 R. 42). The documents were shown to the court, which then ruled (1 R. 42–43):

> I conclude from what I see here that you would not be entitled to it. It is his work sheet in preparation for trial. It is what he has dictated to his stenographer in preparing for the trial here.

Petitioner Gosser asserts that the opinion of the court of appeals reveals that the court did not make an *in camera* inspection of the documents, and he also questions whether the documents were forwarded by the clerk of the district court to the court of appeals. But it was petitioner's responsibility—as appellant below—to see to it that the proper documents were forwarded to the reviewing court. Nor does it appear that petitioner questioned government counsel's representation that these were "work sheets" or ever asked that they be examined by the court of appeals. In these circumstances, any failure by the court of appeals to examine the documents cannot now be asserted as grounds for reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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